As discussed, the industry has made substantial progress on its own in this area. But because ensuring basic emergency access is imperative for safeguarding life and property, Commission leadership and involvement in this area, at least in helping to establish national standards, is warranted. The Commission also should address disability access for IP-enabled services to ensure that access is incorporated early in the development stage of this new technology before new barriers are inadvertently created.

Proliferation of IP-enabled services also requires a new approach to universal service. *First*, the Commission should revisit its universal service contribution requirements and affirm that it has authority to require support from IP-enabled services providers; otherwise, as traffic migrates off the PSTN, the universal service burden on legacy service providers and their customers will increase significantly. *Second*, the Commission should confirm that, while IP-enabled services are not (and should not) be supported today, the Commission has the authority to provide support for these services at some point in the future if and when it determines such support is warranted under the Act. *Finally*, it is conceivable, although not likely, that the spread of IP-enabled services may require minimal, targeted Commission oversight to ensure that certain consumer protections not covered by general consumer protections statutes are addressed. But on the whole, the market for such services is sufficiently robust as to make such regulation unnecessary.

A. The Commission Should Promptly Clarify the Intercarrier Compensation Obligations Applicable to IP-Enabled Services that Make Use of the PSTN.

One of the most destabilizing trends in the modern communications industry is escalating uncertainty about the ground rules for how the Internet and IP-enabled services affect intercarrier compensation. Several years ago, profound regulatory doubt about the compensation issues related to ISP-bound dial-up traffic led to massive industry dislocations as regulation-driven

arbitrage opportunities arose and were then belatedly corrected. And that same uncertainty threatens to resurface today on a much larger scale unless the Commission addresses the intersection of IP-enabled services with the traditional access charge regime in a critical set of circumstances: where providers of IP-enabled services make use of the PSTN not to reach their own subscribers, but to reach third parties that are not their customers and with whom they have no contractual relationship, such as PSTN end users at the terminating end of a VoIP call.

The consequences of such uncertainty are unfortunate. The surest way to depress investment in any industry is to sow confusion about what the ground rules are for competition and everyday operations.[147/] And the surest way to distort the competitive trajectory of any industry is to permit arbitrary inconsistencies in those rules to create arbitrage opportunities that allow inefficient competition to flourish. Such uncertainty and arbitrage will be this Commission's legacy unless it acts now to reject proposals by many VoIP providers to carve out a new, arbitrary exception to the access charge regime. Specifically, those providers seek immunity from an obligation to pay access charges for traffic they hand off to the PSTN, even though a PSTN subscriber receiving a call placed by a VoIP subscriber is not receiving an information service, but simply a basic telephone call over the PSTN. In the long term, the Commission should resolve the controversy about this issue by adopting a unified scheme of intercarrier compensation for the industry as a whole. In the short term, however, particularly given the central role that access charges now play in keeping end user rates affordable and compensating for carriers' actual costs, the Commission should reaffirm that such providers owe

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147/ Indeed, Congress has specifically directed the Commission to "remove barriers to infrastructure investment" for advanced services. 47 U.S.C. § 157(a) note.

access charges for traffic terminated on the PSTN, regardless of whether the service they provide to their own customers in IP format is classified as an information service.

As an initial matter, this result is already required by the Commission's existing rules, under which any providers that use ILEC local exchange switching facilities, including information service providers, are subject to the baseline obligation to pay access charges unless specifically exempted. The sole exemption the Commission has created is a narrow one that exempts an information service provider from access charges only with respect to the connection between it and its own customer. The Commission accordingly should enforce the access charge obligation where IP-enabled services originate or terminate on the PSTN in the same manner as they do with respect to traditional telecommunications services, unless or until the Commission adopts a unified regime for intercarrier compensation generally. By applying its access charge rules in a uniform and competitively neutral manner to *all* users of local switching facilities, the Commission will achieve its stated goal of ensuring that the costs of the PSTN are paid for by all that use it,[148] while eliminating opportunities for regulatory arbitrage and preserving a critical component of ILECs' ability to provide communications services at affordable rates.[149]

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148 *See NPRM* ¶ 33 ("As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.").

149 SBC previously presented many of these arguments in its opposition to Level 3's petition for forbearance from the application of access charges to certain VoIP services. *See* Opposition of SBC Communications Inc., *Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, Docket No. 03-266, at 9-18 (filed Mar. 1, 2004) ("SBC Opposition to Level 3 Forbearance Petition"). SBC incorporates those arguments by reference, and restates them here for purposes of ensuring a complete record in this proceeding.

1. The Commission Should Enforce Its Existing Access Charge Rules For Traffic That Originates or Terminates on the PSTN.

Providers of IP-enabled services that originate and terminate traffic on the PSTN have always been considered users of access services and are subject to the baseline requirement to pay access charges, except to the precise extent to which the Commission has specifically exempted them from that requirement in defined circumstances.[150/] As discussed below, while the ESP exemption applies when information service providers use the PSTN to connect with their own subscribers, it has never been extended to a situation in which information service providers use the PSTN to connect with third parties to whom they are not providing an information service. Finally, as further explained below, the 1996 Act preserved that obligation by grandfathering the Commission's existing access charge rules in section 251(g).

The Commission's access charge obligation applies broadly to all users of access services, not just interexchange carriers — and even the latter category is defined broadly to encompass an array of access customers.[151/] As the Commission observed long ago, information service providers — then referred to as "enhanced service providers" — are "[a]mong the variety of users of access service," which also includes facilities-based carriers, resellers, sharers, privately owned systems, and others.[152/] As such, they "obtain[] local exchange services or

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150/ Although the Commission states that it does not intend to address "whether charges apply or do not apply under existing law," it asks for comment concerning the authority under which it can require providers of IP-enabled services to pay access charges. *NPRM* ¶ 61. As explained herein, the Commission's existing access charge rules provide that authority.

151/ *See, e.g.*, 47 C.F.R. § 69.5(b); Memorandum Opinion and Order, *Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, 1182 (1984) (defining interexchange carrier as "*any* individual, partnership, association, joint-stock company, trust, governmental entity or corporation engaged for hire in interstate or foreign communication by wire or radio, between two or more exchanges").

152/ Memorandum Opinion and Order, *Petitions for Reconsideration of MTS and WATS Market Structure*, 97 F.C.C.2d 682, 711-12 ¶ 78 (1983) ("*MTS/WATS Market Structure Order*").

facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit [the ISP's] location," which the information service provider then "connects . . . to another service or facility over which the call is carried out of state."[153/] For that reason, the Commission stated at the time it created the access charge regime that its "intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers and *enhanced services providers*."[154/] The Commission subsequently reiterated that it "initially intended to impose interstate access charges on enhanced service providers for their use of local exchange facilities to originate and terminate their interstate offerings."[155/]

Instead, however, the Commission devised its "ESP exemption." Specifically, the Commission exempted information service providers from paying access charges on the connections to their subscribers and permitted them to obtain the access services necessary to receive their *subscribers'* traffic through "end user" lines ordered under LECs' local business tariffs, subject to an additional surcharge designed to substitute, to some extent, for the direct payment of access charges.[156/] This arrangement did not convert information service providers

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153/ *Id.*

154/ *Id.* at 711 ¶ 76(emphasis added).

155/ Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, 4305 ¶ 2 (1987).

156/ *MTS/WATS Market Structure Order* at 711-15 ¶¶ 77-83; Memorandum Opinion and Order, *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 167-68 ¶ 318 (1988).

from being "[a]mong the variety of users of access service"[157] into true "end users;" rather, they were merely treated as end users "for pricing purposes."[158]

Further, the history and application of the ESP exemption make clear that the exemption was never intended to be a blanket waiver of *all* access charges in connection with any use of ILEC local exchange switching facilities in which the information service provider may engage. The ESP exemption was designed specifically and exclusively to exempt traffic between an information service provider and its customers, a policy reflecting the fact that, when the exemption was adopted in 1983, the Commission was seeking to spare fledgling enhanced services providers from having to bear what were then significant entry costs.[159]

But the Commission never suggested that the exemption would extend to traffic sent by an information service provider to a customer on the PSTN that is not its own customer (for example, a party called by the ISP's customer).[160] With respect to such traffic, the PSTN end user is not the customer of the ISP and is certainly not receiving an information service; when the call originates or terminates on the PSTN, it looks to the PSTN subscriber precisely like any other PSTN-based call. On that PSTN leg of the call, then, the information service provider

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157/ *MTS/WATS Market Structure Order* at 711-12 ¶ 78.

158/ Declaratory Ruling and Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, 3701 ¶ 17 (1999) ("*ISP Intercarrier Compensation Order*").

159/ *MTS/WATS Market Structure Order* at 711-15 ¶¶ 77-83.

160/ In fact, prior to the advent of the IP-enabled services addressed in this proceeding, the Commission had no reason even to consider the application of access charges to information services traffic that terminated on the PSTN, since information service providers historically used the PSTN only to send or receive calls from subscribers seeking access to their information service. *See, e.g., 1997 Access Charge Reform Order* at 16132-33 ¶ 343 (stating that the ESP exemption applies to information service providers when they "use incumbent LEC networks *to receive calls from their customers*") (emphasis added).

should have the same obligation to pay access charges as any other user of an ILEC's local switching facilities.

Indeed, even AT&T, a large payor of access charges and a staunch advocate for overbroad interpretations of the ESP exemption, was forced to acknowledge the limits of the ESP exemption in a recent *ex parte* filed with the Commission: "[T]he Commission has squarely rejected the claim that 'enhanced service providers' are categorically exempt from interstate access charges even when they offer telecommunications services; rather, it has held that the exemption applies to any entity (whether 'traditional IXC' or 'enhanced service provider') that provides enhanced services (but only to the extent that it is providing such services)."[161/] In this context, IP-to-PSTN VoIP providers cannot avoid access charges on the PSTN end of an interexchange call, where the PSTN subscriber participates by means of a telecommunications service, simply because they provide their end users on the IP end with an "enhanced" (information) service.[162/]

The Commission has never deviated from its view that information service providers are users of access services. And it certainly has not suggested that the scope of the access charge obligation has changed since its inception. To the contrary, section 251(g), added by the 1996 Act, expressly provides that "exchange access, information access, and exchange services for such access" would be provided "to interexchange carriers and information service providers" in the same manner as they had been prior to the Act's passage, "including receipt of

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161/ Letter from D. Lawson, Counsel for AT&T, to M. Dortch, CC Docket No. 02-361, at 3 (Apr. 13, 2004).

162/ We use the term "IP-PSTN" to collectively describe traffic that originates in IP and terminates on the PSTN as well as traffic that originates on the PSTN and terminates in IP, unless otherwise noted.

compensation."[163] Because providers of IP-enabled services are users of access services to the extent they rely on the PSTN for the origination or termination of traffic, as opposed to using it merely to enable their own customers to access an information service, they are subject to the baseline obligation to pay access charges on any portion of a call that originates with or terminates to an end user on the PSTN that is not the customer of that particular provider — unless and until the Commission modifies its access charge rules.

The D.C. Circuit's decision in *WorldCom, Inc. v. FCC* does not require a different result.[164] There, the D.C. Circuit held that section 251(g) did not exempt ISP-bound traffic from section 251(b)(5) because it found that there were no rules governing the intercarrier compensation for that traffic when the 1996 Act was enacted. But there clearly *were* rules governing the payment of access charges for PSTN-originated and PSTN-terminated traffic.[165] Indeed, those rules have been in place since 1983. Thus, the status quo under the Commission's existing rules is that access charges apply to IP-PSTN services, unless an exception applies or until the Commission changes those rules in the future.

This conclusion is consistent with the logic in the Commission's recent *AT&T Access Charge Order*.[166] As the Commission stated in that decision, "[W]e see no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules, particularly where, based on the record before us, end users have received no benefit in terms of additional functionality or reduced prices."[167]

163/ 47 U.S.C. § 251(g).

164/ *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

165/ *See* 47 C.F.R. § 69.5(b).

166/ *See AT&T Access Charge Order* ¶ 1.

167/ *Id.* ¶ 17.

Rather, the Commission properly recognized that such a service should be subject to access charges to eliminate opportunities for regulatory arbitrage. The Commission explained, "[E]xempting from interstate access charges a service such as AT&T's that provides no enhanced functionality would create artificial incentives for carriers to convert to IP networks."[168/] The same is true for genuine IP-enabled services, which likewise offer no enhanced functionality to a party on the PSTN (*e.g.*, a LEC's customer) who calls or is called by the customer of an IP-enabled service provider. In such cases, the LEC's customer is not receiving anything other than ordinary voice telephone service. While the provider of the IP-enabled service may pick up (or drop off) the call over a broadband connection and provide some enhanced functionality to *its* customer, the LEC customer obtains nothing other than a standard telephone call, which uses standard CPE, a standard NANP telephone number, and experiences no change in form or content.[169/] In short, providers of IP-enabled services should pay for their access to, and use of, the PSTN, just as any other service provider is required to do.[170/]

A VoIP provider cannot invoke the ESP exemption to avoid that obligation because the customer originating or receiving the call on the PSTN is *not* a customer of the VoIP provider. Hence the ESP exemption does not apply. Nor would it matter whether a CLEC or an IXC stands between the VoIP provider and the LEC that originates or terminates the call over the PSTN. The VoIP provider is using the PSTN facilities of the originating or terminating LEC and must pay for that use. Indeed, for access charge purposes, this situation is no different from traditional scenarios in which a long distance carrier purchases the services of a competitive

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168/ *Id.* ¶ 18.

169/ *Report to Congress* at 11541-44 ¶¶ 84-89.

170/ *NPRM* ¶ 33.

access provider or other CLEC for some portion of the link between its network and the originating LEC's end user. In that context, the long distance carrier must pay the originating LEC for whatever portion of the service it obtains from that LEC.[171] Thus, calls from a VoIP customer that terminate over ILEC switching facilities to a PSTN subscriber are subject to terminating access charges; calls from a PSTN subscriber to a VoIP customer that originate over ILEC switching facilities are subject to originating access charges.[172] In no event would the originating LEC owe compensation to the CLEC intermediary.

In all of these cases, the application of access charges is a necessary transitional means of preserving industry stability, pending the adoption of a unified intercarrier compensation regime, as traffic migrates from the PSTN to VoIP. Particularly in the access charge context, "[a]voidance of market disruption pending broader reform is, of course, a standard and accepted justification for a temporary rule."[173]

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[171] *See* Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 ¶ 9 (1999) ("When two carriers jointly provide interstate access (e.g., by delivering a call to an interexchange carrier (IXC)), the carriers will share access revenues received from the interstate service provider."), *vacated and remanded on other grounds*, *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); Memorandum Opinion and Order, *Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, 2 FCC Rcd 4518 ¶ 2 (1987) (stating that carriers' tariffs include two options related to the joint provision of access services, the second of which, meet point billing, "require[s] the LECs involved to divide ordering, rating and billing services on a proportional basis, so that each carrier billed under its respective tariff"); *see also* Second Report and Order and Third Notice of Proposed Rulemaking, *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7374 ¶ 1 (1993) (requiring expanded interconnection for switched transport services).

[172] Given the geographic indeterminacy of telephone numbers used in an IP environment, there may be billing requirements that pose challenges in applying access charges to IP-PSTN traffic in some instances. But such implementation challenges should not prevent the Commission from articulating the rule that interstate access charges do, in fact, apply to IP-PSTN traffic, and addressing any challenges on a case-by-case basis.

[173] *Competitive Telecomm. Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (upholding EELs restrictions designed in part to preserve special access revenues); *accord Competitive Telecomm.*

A contrary result would also be unreasonably discriminatory, in that it would grant preferential treatment to one particular class of service providers that uses the PSTN in the same way as others who are indisputably required to pay access charges. Such a decision would give the exempt providers a substantial unwarranted cost advantage over carriers that provide competing voice services using the same traditional circuit-switched facilities, allowing VoIP providers to pay lower rates for providing a voice product to their end users. Only through a uniform application of the access charge obligation can the Commission foreclose the competition-skewing incentives it described in rejecting AT&T's proposal for an access charge loophole.[174/] More generally, as the Commission itself recognizes, "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways."[175/]

In addition to asking whether access charges should apply when IP-enabled services use the PSTN (and they already do as a matter of law), the Commission seeks comment on whether it should create a two-tiered regime, in which providers of IP-enabled services are effectively entitled to discounted access services as compared to traditional telecommunications providers offering functionally equivalent services.[176/] In particular, a few carriers have suggested that IP-

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Ass'n v. FCC, 117 F.3d 1068, 1073-75 (8th Cir. 1997) (upholding interim access charge obligations in UNE context despite claimed lack of statutory authorization for them).

174/ *See AT&T Access Charge Order* ¶ 18.

175/ *NPRM* ¶ 33.

176/ *NPRM* ¶ 62.

enabled service providers should pay reciprocal compensation instead of access charges.[177] For the reasons just discussed, the Commission should not depart from its existing intercarrier compensation rules in this manner.[178] Such a regulatory system would produce the same irrational arbitrage and competitive asymmetries described above.[179]

Finally, insulating providers of IP-enabled services from paying access charges for traffic they send to a LEC's customer on the PSTN would harm consumers by threatening universal service and ILECs' ability to maintain affordable end user rates. The Commission has long recognized that its universal service policies are linked to the ability of ILECs to offer affordable communications services, which is itself largely dependent on a combination of multiple sources of income, including access charges.[180] As SBC explained at length in its comments on Level 3's forbearance petition,[181] access charge reform must proceed in unison with universal service reform and, as necessary, adjustments to end user rates, to make up any shortfalls caused by reductions in access charges. Such reform must be conducted on an integrated basis, not in a one-sided fashion that will benefit only a select group of providers while exposing ILECs to

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177/ *See* Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266, at 31-34 (filed Dec. 23, 2003); *see also NPRM* ¶ 62 (asking whether carriers should be required to pay compensation under section 251(b)(5) of the Act rather than access charges).

178/ In addition, there is no reason to believe that state-ordered reciprocal compensation rates would be sufficient to recover the costs associated with the provision of access services. The fact that reciprocal compensation rates have been judged reasonable in one context in no way suggests that they remain so with respect to access services.

179/ The Commission should not, however, prevent carriers from *voluntarily* developing innovative interconnection services to meet marketplace demands.

180/ Sixth Report and Order, *Access Charge Reform*, 15 FCC Rcd 12962, 12965-74 ¶¶ 5-28 (2000) ("*CALLS Order*") (discussing the history of the Commission's regulations governing intercarrier compensation and universal service).

181/ *See* SBC Opposition to Level 3 Forbearance Petition at 6-9.

massive regulatory arbitrage that will jeopardize affordable telephone service for consumers and businesses. Accordingly, the Commission should immediately act to preserve, rather than erode, affordable telephone service by declaring that IP-enabled service providers must pay access charges when they send traffic to, or receive traffic from, non-customers on the PSTN — unless and until the Commission adopts a unified regime for intercarrier compensation.[182/]

2. The Commission Should Apply Interstate Access Charges to All IP-Enabled Services That Use the PSTN.

The Commission should clarify not only that IP-enabled service providers must pay access charges for their use of the PSTN for communications with non-customers, but also that the applicable charges are *interstate* access rates. This is the approach that is most consistent with the recognition that IP-enabled services are indivisibly interstate. Moreover, applying a single access charge regime to all IP-enabled service traffic will bring stability and certainty to intercarrier compensation obligations in this area, while allowing ILECs to maintain affordable local telephone service, pending the adoption of a unified regime for intercarrier compensation generally.

The Commission should reaffirm its existing rule that, when an ILEC's local exchange switching facilities are used for the provision of jurisdictionally interstate services, as is the case with IP-PSTN traffic for the reasons discussed above, the use of those facilities "by definition

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182/ We recognize that some Internet service providers may offer VoIP services to their subscribers over "local" dial-up connections that use advanced software compression algorithms or next generation high-speed modems. In these circumstances, the end-user would be a customer of the ISP and would use the PSTN to access the ISP. Thus, under existing rules, the ESP exemption would apply, and compensation arrangements for such traffic would be governed by the Commission's compensation rules for ISP-bound traffic. Of course, to the extent the end-user dials a long-distance call to reach her ISP, the carrier of that long-distance call would owe jurisdictionally appropriate access charges — intrastate charges if the ISP and the end user were located in the same state, interstate charges if they were not.

constitute[s] a part of the interstate access service" and are governed by interstate access rules.[183/] That rule applies even though such services or facilities may, in limited instances, include an intrastate component. The Commission reached this precise jurisdictional conclusion when it ruled that DSL service is jurisdictionally interstate and is thus properly tariffed at the federal level, even though some of the traffic it carries "may be destined for intrastate or even local Internet websites or databases."[184/]

Moreover, for the same basic reasons (discussed above) that it would be impracticable to jurisdictionally divide IP-enabled services up into distinct interstate and intrastate spheres, it would likewise be impracticable to apply different compensation rules depending on whether the IP packets associated with any given call cross state borders. Just as the Commission found it would be infeasible to impose such a regime for jurisdictional purposes on Pulver's service,[185/] the Commission should also find that such geographical tracking would be inappropriate in determining compensation rules for any IP-enabled services — both because IP packets travel with geographic unpredictability across the global Internet and because of the geographically indeterminate nature of IP-enabled services.

183/ *Bill Correctors v. Pacific Bell*, 10 FCC Rcd 2305 ¶ 17 n.41 (1995) (citing *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977)); *see* 47 C.F.R. § 69.1(a) (establishing "rules for access charges for interstate or foreign access services"); *id.* § 69.2(b) (stating that "[a]ccess [s]ervice includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication").

184/ *GTE Order* at 22478-79 ¶ 22; Memorandum Opinion and Order, *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 218 ¶ 36 (1974) (asserting federal jurisdiction over the interconnection of customer-provided communications equipment with the PSTN, stating that "this Commission has repeatedly exercised jurisdiction over facilities and instrumentalities used in interstate communication despite the circumstance that such facilities are used also to provide intrastate service") (citations omitted).

185/ *Pulver Declaratory Ruling* at 3320-21 ¶ 21.

The application of interstate access charges for all IP-to-PSTN traffic is also the most reasonable approach from an economic perspective. As IP-enabled services become widespread, many subscribers will use them as replacements for ordinary circuit-switched telephony. To ensure industry stability during the transition to a unified intercarrier compensation regime, LECs should not receive diminished compensation when they originate or terminate traffic over the PSTN. That compensation traditionally would involve the assessment of reciprocal compensation for local calls, interstate access charges for long distance calls that cross state boundaries, and intrastate access charges for toll calls that remain within state boundaries. Of those three types of payment obligations, reciprocal compensation typically is the lowest and intrastate access charges are the highest. Interstate access charges, which fall in between, thus serve as a rough proxy for the compensation that PSTN providers would receive in the absence of wholesale conversions to IP-enabled services. Indeed, depending on customer traffic patterns, use of interstate access charges may somewhat *understate* what PSTN providers would otherwise receive because, at least in the near term, flat-rated VoIP services may be attracting heavy users of circuit-switched toll services, for which compensation is recovered *exclusively* through interstate and (higher) intrastate access charges.[186/] Nonetheless, although inexact, the approach proposed here will provide stability during the intervening period before the Commission adopts a unified solution to the question of intercarrier compensation generally. Finally, the Commission has already determined that existing interstate access charges are reasonable as a form of compensation for the termination of interstate traffic. The Commission has approved

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186/ *See* VoIP Fact Report at 16, 18; *VoIP fast becoming Mainstream Service yet multiple standards still exist*, M2 Presswire, 2004 WL 74988509 (Apr. 26, 2004).

such charges as consistent with sections 201 and 202 of the Act, and it has removed implicit universal service support from them in connection with the CALLS and MAG plans.[187/]

In declaring that interstate access charges are applicable to IP-enabled services that originate or terminate in circuit-switched format on the PSTN, the Commission must also permit carriers to adopt effective mechanisms for preventing fraud in the implementation of such a declaration. In particular, the Commission should authorize ILECs to include provisions in their interstate access tariffs and interconnection agreements that would require providers to pay the highest access charge that could otherwise be applied, whether interstate or intrastate, in the event they are discovered to have disguised (or assisted in disguising) jurisdictionally interstate IP-to-PSTN calls as local circuit-switched calls for purposes of evading the access charge regime. Further, the Commission should declare that, when a dispute arises about whether particular traffic is subject to interstate access charges as IP-to-PSTN traffic, the burden of proof is on the provider of the IP-to-PSTN services (*i.e.*, a party[ies] sending traffic to or picking traffic up from the PSTN) to demonstrate that the traffic is not subject to interstate access charges. The Commission should also take swift and strong enforcement action against any party that engages in access charge fraud. Indeed, if the Commission does no more than declare that interstate access charges apply without providing sufficient incentives for compliance with those access charge obligations, it will only encourage providers to engage in unlawful access avoidance schemes, thereby requiring ILECs to expend substantial time and resources to

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187/ *See CALLS Order* at 12975-76 ¶ 32; Second Report and Order and Further Notice of Proposed Rulemaking, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers,* 16 FCC Rcd 19613, 19617 ¶ 3 (2001) ("*MAG Order*").

investigate and prosecute the perpetrators. But if the Commission implements the measures discussed above, it can send a clear signal that access charge fraud will not be tolerated.

If, however, the Commission is for any reason unwilling at this time to adopt the uniform application of interstate access charges for IP-to-PSTN calls as proposed by SBC, the Commission must not take any action that will undermine the ability of SBC or any other local exchange carrier to maintain affordable local telephone service for American consumers and businesses. Thus, in the event the Commission does not apply interstate access charges uniformly to IP-PSTN calls (or otherwise chooses not to resolve the issue of intercarrier compensation for IP-enabled services in a timely manner), the Commission should, at a minimum, expeditiously affirm that local telephone companies should continue to charge "jurisdictionalized" compensation rates for IP-PSTN traffic (notwithstanding its interstate nature) in accordance with their existing tariffs — at least until the Commission completes its intercarrier compensation proceeding. Existing tariffs of local exchange carriers contain various methods to deal with the lack of geographically accurate endpoint information, such as the use of calling party number information together with other data.[188/] Such an affirmation from the Commission is critically important to ensure that local telephone companies are protected from unlawful access charge avoidance schemes that could jeopardize the affordability of local rates during the transition to a unified intercarrier compensation regime.

188/ *See, e.g.*, Pacific Bell Telephone Company Schedule Cal. P.U.C. No. 175-T, Section 2.3.14; Pacific Bell Telephone Company Tariff F.C.C. No. 1, Section 2.3.14. Until the Commission addresses the access charge issues raised in this proceeding or otherwise changes its access charge rules, these provisions continue to govern the application of access charges to IP-to-PSTN services.

B. The Commission Should Adopt Numbering Policies That Promote the Development of IP-Enabled Services and Facilitate Competition While Preventing Number Wastage.

IP-enabled service providers that wish to provide access to the PSTN must obtain North American Numbering Plan ("NANP") telephone numbers for their customers; otherwise, those customers could not receive calls from subscribers to a circuit-switched network. As discussed below, the Commission's current rules limit direct access to NANP numbering resources to certified (state or federal) telecommunications carriers, a class that excludes providers of IP-enabled services, which, as discussed above, are information service providers. Although IP-enabled service providers may obtain such numbers *indirectly* by partnering with a competitive LEC, such arrangements may not reflect the most efficient network architectures and may impede the development of innovative services. The Commission should thus amend its numbering rules to place IP-enabled service providers on competitive par with telecommunications carriers with regard to access to numbering resources. Failure to do so would violate the Commission's obligation under section 251(e) of the Act to "make [NANP] numbers available on an equitable basis," a mandate the Commission itself has properly interpreted to preclude numbering rules that, like those at issue here, "unduly favor or disadvantage any particular industry segment or group of consumers" or "unduly favor one technology over another."[189/]

Of course, the Commission must ensure that numbering resources are not wasted or exhausted. Accordingly, the Commission can and should ensure that providers of IP-enabled services meet basic criteria designed to show their readiness and intent to use the numbering

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189/ Public Notice, *FCC Establishes North American Numbering Council Advisory Committee*, 11 FCC Rcd 22367, 22368 (1996).

resources they obtain, just as it does with telecommunications carriers.[190] And the Commission should impose basic numbering conservation measures on all IP-enabled service providers that use numbers, including those that rely on telecommunications carriers to obtain numbers for them. There has been some speculation that VoIP, like virtual NXX ("VNXX"), paging, and certain other services, may exacerbate number exhaustion concerns because end users can obtain several numbers without regard to geographic location. The Commission should certainly monitor such concerns, but it should also recognize that some VoIP offerings may *reduce* number exhaustion by enabling subscribers to consolidate existing lines for voice and data, for example.

Finally, the Commission should ensure that VoIP providers that obtain the benefits of numbering — whether directly or indirectly — meet the basic responsibilities that accompany those benefits. Today, telecommunications carriers alone are subject to number portability obligations. But VoIP providers that use numbers to provide competing voice services may not themselves be directly subject to such obligations. Subscribers that use VoIP thus would have a unique disincentive to switch to a competing service because they would be unable to take their numbers with them. This can warp competition both between VoIP and legacy services and among VoIP services. The Commission accordingly should enforce local number portability obligations with respect to VoIP providers that use numbers, and it has clear authority to do so.

190/ *See, e.g.*, Third Report and Order and Second Order on Reconsideration, *Numbering Resource Optimization*, 17 FCC Rcd 252, 256-57 ¶ 7 (2001) ("*Third Numbering Order*"); Second Report and Order, *Numbering Resource Optimization*, 16 FCC Rcd 306, 310 ¶ 4 (2000); Report and Order and Further Notice of Proposed Rulemaking, *Numbering Resource Optimization*, 15 FCC Rcd 7574, 7579-80 ¶ 6 (2000) ("*First Numbering Order*").

1. IP-Enabled Service Providers That Meet Certain Essential Requirements Should Be Given Direct Access to NANP Numbering Resources.

Many VoIP services in the market today allow customers on a broadband IP network to call parties served by a carrier operating on a time division multiplexed ("TDM") network that is part of the PSTN, and vice versa. In order for such calls to be possible, the VoIP provider must be able to assign a telephone number to its customer; otherwise, a customer on the PSTN would have no way of dialing the VoIP customer. VoIP providers, however, are information service providers, which are not eligible for direct assignment of telephone numbers under the Commission's existing rules. This is because section 52.15(g)(2)(i) of the Commission's rules provides that numbering applicants must be "authorized to provide service in the area for which the numbering resources are being requested."[191/] The Commission has interpreted that rule as requiring "carriers [to] provide, as part of their applications for initial numbering resources, evidence (*e.g.*, state commission order or state certificate to operate as a carrier) demonstrating that they are licensed and/or certified to provide service in the area in which they seek numbering resource[s]."[192/]

Accordingly, in order to obtain NANP telephone numbers that can be assigned to their customers, VoIP providers often purchase a retail product from a competitive LEC, such as a Primary Rate Interface ("PRI") ISDN line. Typically, the VoIP provider also uses this retail product to interconnect with the PSTN so it can send and receive certain types of traffic between its network and various carrier networks.[193/] In this arrangement, the competitive LEC

191/ 47 C.F.R. § 52.15(g)(2)(i).

192/ *First Numbering Order* at 7613 ¶ 97.

193/ Many VoIP providers convert VoIP traffic from IP format to circuit-switched format before delivering that traffic to a LEC.

terminates the VoIP traffic on the PSTN or delivers that traffic to another carrier for termination on the PSTN.[194/]

While this form of interconnection may allow the VoIP provider to obtain numbering resources (by purchasing a PRI) and interconnection with the PSTN, it may not be the most efficient or cost-effective means for a VoIP provider to send originating traffic to the PSTN because it requires separate interconnection with potentially multiple end office switches, using access products that may be limited in terms of availability and scalability. In particular, a VoIP provider's ability to offer service may be limited by the locations, calling scopes, and installation schedules of the providers and products utilized to gain access to end-offices.[195/]

Thus, in many ways, the current situation faced by VoIP providers seeking direct interconnection with the PSTN is analogous to the early days of the commercial wireless industry. Initially, many wireless carriers did not own their switches and instead relied on ILECs to perform switching functions for them. As a result, wireless carriers needed to interconnect with individual ILEC end offices to route traffic. This is known as "Type 1" interconnection.[196/] As the wireless industry matured and wireless carriers began purchasing switches of their own,

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194/ As discussed in Section VI.A of these comments, when interexchange traffic is delivered to an incumbent LEC for termination on the PSTN, the incumbent LEC is entitled to receive access charges for that traffic under the Commission's current rules, regardless of whether that traffic originated in IP format on a broadband network. VoIP providers, and the other carriers they partner with, are not permitted to terminate interexchange traffic to an incumbent LEC using PRI lines.

195/ For example, PRI lines are not available in all central office serving areas.

196/ *See* Declaratory Ruling, *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910, 2913-14 ¶¶ 27-35 (1987) ("*Wireless Declaratory Ruling*"); *FCC Policy Statement on Interconnection of Cellular Systems*, attached as Appendix B to Memorandum Opinion and Order, *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 1986 LEXIS 3878 (1986) ("*Wireless Policy Statement*").

they sought more efficient means of interconnection with the PSTN, both at ILEC end offices and at ILEC tandem switches, which became known as "Type 2" interconnection.[197/] In facilitating this latter form of interconnection, the Commission recognized that it may offer "superior technical capabilities and greater service quality,"[198/] and may help wireless carriers to "minimize unnecessary duplication of switching facilities and the associated costs to the ultimate consumer."[199/] The Commission further observed that Type 2 interconnection allows wireless carriers to design their networks more efficiently and would further the Commission's "longstanding goal of bringing cellular service to the public as rapidly as possible."[200/] At the same time, the Commission recognized that wireless providers also needed efficient access to numbering resources, which were not "owned" by the ILECs (or CLECs today),[201/] but are instead a "public resource."[202/] The Commission concluded that wireless carriers, just like the ILECs, were "entitled to reasonable accommodation of their numbering requirements."[203/]

Much like the wireless industry's early efforts to evolve from Type 1 to Type 2 interconnection, amending the Commission's rules to allow VoIP providers to obtain numbering resources directly from the North American Numbering Plan Administrator ("NANPA") and /or the Pooling Administrator ("PA") would level the inter-modal playing field. By interconnecting with the PSTN on a trunk-side basis, at a centralized switching location — *e.g.*, a tandem switch

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197/ *Wireless Declaratory Ruling* at 2913 ¶ 27.

198/ *Id.*

199/ *Wireless Policy Statement* at *32-33 ¶ 2 (citation omitted).

200/ *Wireless Declaratory Ruling* at 2913 ¶ 29, 2914 ¶ 33.

201/ *Wireless Policy Statement* at *34-35 ¶ 4.

202/ *See* Report and Order, *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588, 2591 ¶ 4 (1995).

203/ *Wireless Policy Statement* at *34-35 ¶ 4.

— VoIP providers can more efficiently utilize their softswitches and gateways[204/] to develop services that overcome the availability and scalability limitations inherent in the current methods of line-side interconnection to end office switches.

In fact, it is quite clear that the Commission's original rules were never intended to restrict full access to numbering resources by service providers who are willing and able to use NANP numbers to serve customers. As the Commission's *First Numbering Order* explained in 2000, carriers were at that time routinely requesting and obtaining numbers *before* being certified by the state to provide service, "result[ing] in highly inefficient distribution of numbering resources" because numbers frequently sat idle pending certification and actual need.[205/] To avoid such waste, the Commission enacted not only the rule at issue here, but also 47 C.F.R. § 52.15(g)(2)(ii), which requires applicants to "be capable of providing service within sixty (60) days of the numbering resources activation date."[206/] The *Order* emphasizes, however, that neither regulation was intended to prevent *bona fide* applicants, who will actually use the numbers to provide service, from receiving them.[207/]

[204/] A "gateway" or "media gateway" is a device that can receive circuit switched, TDM traffic and packetize it and deliver it to an IP-based network. A media gateway can be combined with, or separate from, a softswitch, which routes packetized traffic on the IP-based network.

[205/] *First Numbering Order* at 7613-14 ¶¶ 94, 96.

[206/] 47 C.F.R. § 52.15(g)(2)(ii).

[207/] *First Numbering Order* at 7615 ¶ 99 (Commission "d[id] not intend to circumscribe any carrier's ability to obtain initial numbering resources in order to initiate service;" its rule was designed only "to prevent actual or potential abuses of the number allocation process;" and it, "[i]n fact, . . . expect[ed] the establishment of these requirements to make more numbering resources available to carriers lawfully authorized by state commissions to provide local service by preventing unauthorized carriers from unlawfully depleting numbering resources."). The Industry Numbering Committee's (INC) rules, which are incorporated by reference in the Commission's own rules, likewise express a clear preference that numbers be associated with actual facilities, precisely because such facilities help demonstrate "readiness" to provide service. 47 C.F.R. § 52.13(b)(3) (incorporating by reference the guidelines of the North

Here, so long as VoIP providers have the facilities at hand to put their numbers to use, there is no principled justification for denying them access to NANP numbers simply because they lack a state certificate. The reason they cannot obtain such a certificate — their status as information service providers — is irrelevant to their ability to use those numbers. And the Commission can ensure that such providers will not waste their numbers by permitting direct assignment of numbering resources only to those providers offering services to the public that: (1) own or control a softswitch connected to the PSTN via tandem interconnection; (2) provide connectivity to the PSTN using a traditional TDM signaling and SS-7 functionality; and (3) provide location routing number ("LRN") functionality for implementation of local number portability. These criteria will demonstrate the "facilities readiness" that the Commission considers an important indicator of a numbering applicant's intention and ability to use the numbers it receives. In addition, by requiring providers to invest in facilities that interconnect with the PSTN in the manner described above, these criteria will help ensure that such providers have an incentive to safeguard the integrity of the PSTN, as well as their own IP networks.

This approach would be fully consistent with and indeed would advance the Commission's obligation to make sure that numbers are available on an equitable basis.[208/] And the Commission also has and should exercise the authority, as a condition for granting those numbers, to ensure that VoIP providers comply with other measures designed to prevent number wastage and support the costs associated with numbering administration. Those measures might, in some instances, have to be adapted to the specific circumstances of the IP-enabled services market and IP technologies under the Commission's Title II non-carrier-specific authority and/or

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American INC); *Thousands-Block Number (NXX-X) Pooling Administration Guidelines*, INC 99-0127-023, § 4.3.1.2 (clarifying that the 60-day requirement is satisfied by "facilities readiness").

208/ *See* 47 U.S.C. § 251(e)(1).

its Title I ancillary authority, but they are relatively straightforward and not unduly burdensome. Specifically, IP-enabled service providers should comply with the following:

- *Contribution to Numbering Administration Costs:* Wireline and wireless service providers are required to contribute to numbering administration costs on the basis of their revenues.[209/] IP-enabled service providers that obtain numbers directly from the NANPA likewise should be required to contribute to the costs of numbering administration, which include pooling and portability administration costs. This, in turn, would require IP-enabled service providers to comply with the Commission's revenue reporting requirements in order to allow the North American Numbering Plan Billing and Collection ("NBANC") agent to determine the appropriate contribution for a given provider. Like other service providers, IP-enabled service providers would be exempt from a contribution obligation if they fall below the *de minimis* threshold in the Commission's rules.[210/]

- *Number Pooling*: The Commission should also extend its thousand-block number pooling requirements to providers that obtain their numbers directly. Number pooling is an important policy that helps to prevent over-distribution of numbers that may not be utilized. The Commission identified NANPA's prior practice of allocating numbers in pools of 10,000 as "one of the major drivers of [number] exhaust."[211/] With thousand-block number pooling, blocks of 10,000 numbers (all of the numbering resources from a single NXX code) are broken up into sequential blocks of 1,000 numbers each (down to the NPA-NXX-X level). The 10 blocks of

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209/ *See id.* § 251(e)(2); 47 C.F.R. § 52.17.

210/ *See e.g.*, 47 C.F.R. § 52.17(a) (no contributions below $25). Of course, providers that obtain numbers through an ILEC or CLEC indirectly contribute to the support for numbering costs by increasing the LEC's revenues.

211/ *First Numbering Order* at 7621-22 ¶ 116.

1,000 numbers are allocated within one rate center, but they can be allocated to multiple service providers. IP-enabled service providers that seek direct access to numbers should be required to implement the necessary technology so that they can use 1,000 number blocks where appropriate to meet their forecast requirements.

- *Reporting Requirements*: Like carriers that use numbering resources, IP-enabled service providers should be required to report Number Resource Utilization/Forecast ("NRUF") data as a condition of direct access to NANP numbers from NANPA or the PA.[212/] To prevent number wastage, all entities using numbering resources should be required to demonstrate their plans to utilize those numbers and then confirm that they have done so. At the same time, to minimize the administrative burdens on emerging IP-enabled service providers, SBC suggests that the Commission impose modified reporting requirements for IP-enabled service providers. IP-enabled service providers, who would be getting numbers directly for the first time (if the Commission amends its rules to permit that), should not initially be required to provide a 5-year forecast because they lack sufficient experience and data to support such a forecast. The 5-year forecast requirement should be suspended until a provider requests its fourth block of numbers in any rate center (*i.e.*, requests more than 3,000 numbers), until the provider exceeds one full NPA-NXX (10,000) where Number Pooling is not implemented, or, in the event the provider reaches neither of these numbering resource utilization thresholds, until three years after the provider first receives numbering resources directly from NANPA or the PA.

Finally, although SBC has focused on number exhaust issues relating to numbers that VoIP providers might obtain directly from NANPA or the PA, there may be IP-enabled service providers that seek to continue obtaining numbers indirectly through other carriers (*e.g.*, by

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212/ 47 C.F.R. §§ 52.15(f)(4)-(5).

purchasing PRI lines). They, too, should be required to comply with certain basic reporting requirements. Such providers should, for example, have to comply with utilization reporting requirements that may apply to carriers that use "intermediate" numbers, such as resellers.[213/]

2. The Commission Should Monitor the Impact of VoIP Services on Number Exhaustion.

Given the finite nature of NANP numbers and the extraordinary cost that would be incurred upon their depletion, the Commission has a valid interest in preventing number exhaustion and wastage. But it is not clear that VoIP service presents any immediate — or indeed, any — cause for special concern. It is true that VoIP services do permit end users to obtain multiple numbers, without any connection to their physical location. But that concern is not unique to VoIP services. Even before such services began to proliferate, paging companies, and CLECs offering virtual NXX, began presenting similar concerns. Further, VoIP services may actually cause a countervailing *reduction* in number usage. IP technology permits consolidation of many services, permitting a subscriber to have one connection for voice and data, for example. As such services proliferate, more and more end users can be expected to give up second lines, thus freeing up some numbering resources.

Until the Commission determines whether and to what extent there is a problem, it should refrain from trying to fashion any type of service-specific rules designed to prevent number exhaustion. Such rules likely would stunt technological and service innovation without producing measurable benefits; the Commission cannot simply turn back the clock and insist that

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213/ *See* North American Numbering Plan Numbering Resource Utilization/Forecast ("NRUF") Report, Form 502, at 2 (rev. June 1, 2002) ("Carriers that receive intermediate numbers must report utilization data for such numbers . . . ."); *id.* at 4 ("Intermediate reporting carriers are not required to complete a forecast form. This exception only applies to carriers that operate solely as intermediate carriers.").

numbers be assigned so that they correlate exclusively to the end user's primary location. The Commission can best contribute to preventing number exhaustion tomorrow if today it confines itself to understanding the scope of the problem and to working with the industry to explore the best means of addressing it.

One issue the Commission should consider in particular when it undertakes that process is the growing concern about whether NANP numbers are now being distributed, or will soon be distributed, to customers located *outside* the United States and other NANP countries as a means for enabling them to avoid international charges. Vonage has suggested, for example, that it is actively investigating the option of procuring NANP numbers for international subscribers physically outside the United States and Canada.[214/] If this practice becomes widespread, such that much of the world's population begins claiming U.S. telephone numbers, it will rapidly deplete the finite stocks of 10-digit NANP numbers. And, once those numbers are depleted, it will cost many billions of dollars to retrofit the current telecommunications infrastructure to accommodate a different numbering scheme.[215/] These are very serious concerns, and the Commission should seek comment on an expedited basis on how it can develop methods for preserving North America's finite numbering resources without unduly interfering with the flexibility of IP-enabled services.

3. The Commission Should Require VoIP Providers That Use Numbers to Offer Number Portability.

The Commission should impose local number portability obligations on VoIP providers that utilize numbers (directly or indirectly) to offer enhanced voice applications, so that VoIP

214/ http://www.vonage.com/features_int_vir_numbers.php ("[Q:] Will Vonage offer International Virtual Numbers outside of Canada? [A:] We are expanding our network rapidly, but are not yet announcing locations outside of Canada.").

215/ *Third Numbering Order* at 256-57 ¶ 7 nn.8-9.

providers do not distort competition by making it impractical for their subscribers to switch service providers. Today, telecommunications carriers alone must offer number portability.[216/] If equivalent obligations are not imposed on their VoIP competitors, such portability could become a one-way street.[217/] VoIP providers that obtain the benefits of numbering — whether directly from NANPA or the PA, or indirectly from a LEC partner — should not obtain an unfair competitive advantage when they do so.

As the Commission has recognized, number portability is essential to reducing the "switching costs" that interfere with free consumer choice even in an otherwise competitive environment.[218/] IP-enabled service providers that use numbering resources to compete with local exchange carriers should have no special advantages in this regard and no special means of pressuring their customers to stick with their existing service simply to avoid the personal disruption that accompanies a change in telephone numbers. In short, like all other competitors, they should be required to allow subscribers to take their numbers with them. The Commission should work with the industry to determine technological means of accomplishing such

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216/ *See* 47 U.S.C. § 251(b)(2) (local exchange carriers must offer number portability)

217/ Today, the typical VoIP provider relies on a telecommunications carrier partner to obtain numbers for it. When a LEC's customer asks to port her number to the VoIP provider, the number is actually ported behind the scenes to the telecommunications carrier partner, which assigns it to the VoIP provider. The VoIP provider may frustrate the customer's efforts to port her number *back* to the LEC in the event she becomes dissatisfied with her VoIP service, because the VoIP provider does not today have any explicit portability obligations, and the telecommunications carrier partner does not itself have any direct relationship with the customer.

218/ *See, e.g.*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 18 FCC Rcd 23697 (2003); First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352, 8355 ¶ 2 (1996) ("*Number Portability Order*") ("Congress has recognized that number portability will lower barriers to entry and promote competition in the local exchange marketplace.").

portability (to the extent there are any unique concerns) and to establish a timetable for compliance.

The Commission's authority to impose local number portability requirements is not constrained to the local exchange carriers covered by the language in section 251(b)(2) of the Act. As an initial matter, the Commission has specifically based number portability requirements in other contexts in part on its Title I authority, wholly apart from any Title II authority.[219/] In addition, as a "belt and suspenders" approach, the Commission could exercise its exclusive authority to ensure "equitable" availability of numbering resources under section 251(e) of the Act to specify that full and effective number portability is a condition of any VoIP provider's direct or indirect use of numbering resources.

C. The Commission Should Participate in Developing National Standards for IP-Enabled 911 Services, and It Has the Authority to Fashion 911 Rules for the Provision of Certain IP-Enabled Services, If It Determines Such Rules Are Necessary.

As IP-enabled services that provide voice applications (such as VoIP) proliferate, such services should provide the responsive and accurate emergency calling capabilities that end users have come to expect from legacy telecommunications services. Because that is not yet uniformly the case, this issue merits Commission involvement and leadership in the near term to ensure that the industry is appropriately addressing this challenge. Today, technological and other limitations make the 911 calling capabilities offered over VoIP services more cumbersome and less effective than those offered over the PSTN. All VoIP providers cannot yet offer their subscribers 911 service that automatically routes emergency calls directly to a public safety

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219/ *See id.* at 8355 ¶ 4 (extending portability requirements to wireless carriers, which have not been classified as "local exchange carriers" (*see* 47 U.S.C. § 153(26)), based on independent authority under sections 1, 2, 4(i), and 332 of the Act).

answering point ("PSAP"). Nor can they offer their customers automated "E-911" capabilities — that is, the automatic transmission to the PSAP of information identifying the location of the customer — without relying on the customer to manually input and update his or her location information.

The Commission has jurisdiction to address this issue, and it should do so. However, it may not be necessary to heavily regulate in this area. The industry is diligently working to address the current 911 shortcomings of VoIP. The Commission may be able to best serve the public interest here by encouraging those efforts and helping to establish uniform, minimal standards.

1. The Commission Has Ample Authority to Address 911 Obligations for IP-Enabled Services that Interconnect with the PSTN and Provide Voice Capabilities.

Even if IP-enabled services are classified (as they should be) as information services, the Commission has clear authority to address the 911 obligations for IP-enabled services and service providers.[220/] The Commission has recognized that, "from the inception of the Federal Communications Commission through to the present day," it has been charged with "ensuring that the public safety needs of Americans are met to the extent that those needs must be

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220/ The Commission must take the lead here. Because IP-enabled services are provided on a national basis, the providers cannot realistically comply with the varied and probably incompatible demands of thousands different PSAPs and fifty different states. Commission leadership is necessary because "specific requirements, . . . vary[ing] significantly from one state to another," would yield "mutually incompatible systems . . . likely to cause user confusion or higher costs in equipment or services." Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, 9 FCC Rcd 6170, 6172 ¶ 11 (1994) ("*1994 E-911 Order*").

transmitted by wire or radio communications to emergency service personnel."[221] The Commission has described this as a "statutory mandate[] under the Communications Act,"[222] flowing from Title I of the Act.[223] Specifically, section 151 of the Act gives the Commission the general authority to make available communications on a national basis, with adequate facilities, "for the purpose of promoting safety of life and property through the use of wire and radio communication."[224] As the Commission has noted, "it is difficult to identify a nationwide wire or radio communication service more immediately associated with promoting safety of life and property than 911."[225] And section 251(e)(3), enacted as part of the Wireless Communications and Public Safety Act of 1999, authorizes (and requires) the Commission to establish 911 as the universal emergency telephone number for the nation.[226] These sections, together with the Commission's general authority to make rules and regulations as necessary to fulfill its duties under the Act,[227] empower the Commission "to determine whether the public interest require[s]

221/ Report and Order and Second Further Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 18 FCC Rcd 25340, 25346 ¶ 14 (2003).

222/ Report and Order and Further Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676, 18681 ¶ 8 (1996) ("*1996 E-911 Order*").

223/ *Id.*

224/ 47 U.S.C. § 151.

225/ *1994 E-911 Order* at 6171-72 ¶ 7.

226/ 47 U.S.C. § 251(e)(3).

227/ See *id.* § 154(i).

that a provider of a particular service should be required to provide 911/E911 to its customers, and if so, to what extent and in what time frame . . . ."[228/]

Nothing in section 151 or section 251(e)(3) suggests that the Commission's 911 authority is limited to telecommunications carriers, and there is no reason it should be. If IP-enabled information services are essential to "promoting safety of life and property," as they increasingly will be to the extent consumers rely on them as their primary voice communications tool, they are plainly covered by the Commission's mandate. As Congress noted in the Wireless Communications and Public Safety Act, the Commission is obligated to preserve a "seamless, ubiquitous, and reliable end-to-end infrastructure for communications . . . to meet the Nation's public safety . . . needs."[229/] And as Congress recognized, "emerging technologies can be a critical component of the end-to-end communications infrastructure."[230/] In these circumstances, the Commission's ancillary authority to promote the goals of the Act and "discharge its overall responsibilities" by overseeing 911 obligations of IP-enabled services is beyond question.[231/]

In a different context, the Commission has defined four criteria that serve as appropriate "gating" criteria for those services that should be subject to 911 obligations. In determining which wireless providers should be subject to E-911 obligations, the Commission considered whether (1) the service "offers real-time, two-way voice service that is interconnected to the public switched network;" (2) customers "have a reasonable expectation of access to 911 or

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228/ *NPRM* ¶ 53 n.162 (citing Memorandum Opinion and Order, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 18 FCC Rcd 25340, 25345-46 ¶¶ 13-15 (2003) ("*E911 Scope Order*")).

229/ 47 U.S.C. § 615.

230/ *See id.* § 615 note (e); Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (codified at 47 U.S.C. §§ 222, 251(e)).

231/ *See Southwestern Cable*, 392 U.S. at 177.

E911 services;" (3) the service competes with traditional voice service; and (4) the service can technically and operationally support E-911.[232/] These basic criteria serve as an appropriate test for those IP-enabled services that would be most clearly within the Commission's 911-related ancillary jurisdiction. Specifically, those IP-enabled services that interconnect with the PSTN and offer subscribers a voice service are those from which subscribers are most likely to expect 911 capabilities.

2. The Commission Should Work with Industry Stakeholders to Establish National 911 Standards for IP-Enabled Services.

The complexities involved in implementing the E-911 requirements for wireless providers offer ample evidence that designing and enforcing acceptable and standardized 911 solutions for IP-enabled services will be neither easy nor quick. The Commission has an important leadership role to assume, and it should do so now to help establish clear standards on which the industry can develop IP-enabled technology and equipment. Establishing standards now will help prevent the disruption and costs associated with retrofitting a solution if, after providers invested in separate, ad hoc solutions, the Commission determined that uniform standards were required. As demonstrated by the 911 wireless implementation experience, attempting to implement uniform standards after years of ad hoc industry development creates numerous technical pitfalls, needlessly consuming time, money, and resources.[233/]

The wireless 911 implementation also highlights the importance of centralized coordination given the number of affected stakeholders. In addition to countless commercial

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232/ *E911 Scope Order* at 25347 ¶ 18.

233/ In the wireless example, national standards still did not exist some sixteen years after wireless service was first introduced in 1983. *See 1996 E-911 Order.* Between 1983 and 1996, the wireless industry generated multiple protocols that ignored previous ANI and ALI call delivery conventions. This proliferation of inconsistent protocols ultimately resulted in a 911 implementation with increased costs and a longer implementation timeframe.

stakeholders and agencies at the local, state, and federal level, there are more than six thousand primary and secondary PSAPs[234/] of varying size, resources, and capabilities.[235/] Addressing technology and standardization issues among so many stakeholders and across jurisdictional divisions between federal, state, and local governments requires strong, national leadership from the Commission.

In considering the 911 standards for IP-enabled services, the Commission should consider and build on the progress that IP-enabled service providers have made working cooperatively with public agencies to date. And the Commission should be careful not to deter the substantial technological contributions that IP-enabled services can make with respect to the provision of E-911 services. The 911 infrastructure technology has not changed significantly since the 1970s and has been upgraded only through a series of patchwork fixes and short-term solutions. The standards fashioned for IP-enabled services must leave room for continued technological development and innovation, and should not cramp such development in order to fit within the framework of a technologically outdated or limited system.

Registered E-911: The Commission and industry resources should focus on the immediate need for E-911 services in VoIP applications where the subscriber has registered his or her location with the VoIP provider. Many such services are already offered today.[236/] SBC-

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234/ *See* http://www.nena.org/911_facts/911fastfacts.htm.

235/ Dale N. Hatfield, *A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services* at 18 (2002) ("Hatfield Report").

236/ VoIP Fact Report at 17 (citing Time Warner Cable, *Time Warner Cable Maine Frequently Asked Questions* (http://www.twcdigitalphone.com/maine/faq_specialfeatures.htm#Can%20I%20call%20911) ("enhanced 911 service is provided" in Time Warner's current VoIP markets); *Cox Communications Inc. at Citigroup Smith Barney Entertainment, Media & Telecom Conference — Final*, Fair Disclosure Wire (Jan. 7, 2004) ("Cox's voice over IP architecture provides customers the same lifeline services, traditional, standard LEC telephone service, including enhanced 911."); *Cable Operators See Advantages to*

IP's HIPCS service, for example, includes E-911 service based on the location of the customer's workstation.[237] And independent VoIP providers may purchase and use SBC's 911 services[238] to offer E-911 services to their own customers. SBC's 911 services allow the VoIP provider to build and maintain their end users' station numbers and associated location records in the E-911 database. In other words, the VoIP provider is responsible for updating each of its end users' initial IP addresses with their fixed physical addresses. Once this information is in the E-911 database, the VoIP provider may transport its end users' 911 calls (with Automatic Number Identification ("ANI")) to the appropriate selective router, and SBC-IP's 911 service will route and deliver the 911 call and the 911 caller's ANI and Automatic Location Identification ("ALI") to the correct PSAP.[239]

Regulating VoIP, Communications Daily (May 4, 2004) ("[Bill Dame, Cox dir.-network switch engineering] said Cox has 'gone the extra mile' to assure high quality of service, including capabilities to add E911"); *see also* M. Paxton, *Cable Telephony Service: The Third Leg of Cable's "Triple Play" Bundle*, In-Stat/MDR at 24 (Nov. 2003) ("While it is not a powered lifeline connection, Optimum Voice will offer E-911 emergency service."); A. Quinton, *et al.*, Merrill Lynch, *VoIP Update* (Dec. 1, 2003) ("Vonage . . . offer[s] a form of 911 service."); Net2Phone Presentation at 13, *FCC VoIP Forum* (Dec. 1, 2003) ("NCT [Net2Phone Cable Telephony] has a 911 solution in place today."); Covad Press Release, *Covad Announces Voice Over Internet Protocol (VoIP) Deployment Plans* (Feb. 9, 2004) ("Covad . . . announced plans to offer Voice over Internet Protocol (VoIP) services to business customers and consumers . . . [with] emergency 911 . . . [as a] standard feature[].").

[237] The accuracy of this 911 service is dependent upon end users to maintain accurate station number and location records in SBC's E-911 database.

[238] A 911 service, available to all VoIP providers, is SBC's Private Switch/Automatic Location Identification ("PS/ALI") product (also known as PS/911 or Locator ID, depending on the geographic region). VoIP providers that are also CLECs may use SBC's existing service ordering/provisioning process for CLECs to provision their customer records in the SBC E911database. Both options provide VoIP providers with direct interconnection with the 911 network, thereby routing 911 calls (and the caller's location) directly to the appropriate PSAP operator.

[239] The accuracy of the records in the E-911 database (and, in turn, the accuracy of the E-911 service) is dependent upon the VoIP provider's maintenance of accurate station number and location records.

The Commission should work with the industry to ensure that all providers of IP-enabled, PSTN-connected services using NANP numbers to provide voice applications can provide E-911 for their registered VoIP services, and do so according to uniform national standards. The first step the Commission should take is to engage actively with the VoIP industry, the Alliance for Telecommunication Solutions ("ATIS"), the Emergency Services Interconnection Forum ("ESIF"), and the National Emergency Number Association ("NENA") to ensure the development of national standards. These organizations are already actively undertaking efforts to address VoIP 911.[240/] Commission leadership will help avoid the potential proliferation of multiple incompatible standards, which would substantially increase the cost, complexity, and timeframe of IP-enabled 911 deployment. By driving the development and acceptance of industry interface standards, the Commission would ensure that VoIP providers can consistently and effectively deliver accurate 911 information to the correct PSAPs, and that consumers can obtain consistent service across providers. Furthermore, if the Commission works with the industry to develop mutually acceptable standards, any need for regulations in the future may be reduced or even eliminated.

240/ Indeed, NENA and VoIP industry participants already have forged an agreement on key elements of providing emergency 911 service to VoIP users. *See* Media Advisory, "Public Safety and Internet Leaders Connect on 911," (Dec. 1, 2003) *available at* http://www.intrado.com/assets/documents/VoIP%20VON-NENA%20Agreement.pdf; AT&T Presentation at 20, *FCC VoIP Forum* (Dec. 2003) ("The National Emergency Number Association (NENA) and VoIP leaders, including AT&T Consumer, reached an agreement on key principles for providing 911 services to VoIP users."); *see also* Written Statement of Michael K. Powell, Chairman, Federal Communications Commission, on Voice over Internet Protocol (VoIP) at 12 (Feb. 24, 2004) ("Powell VoIP Written Statement"). Other voluntary industry efforts include ATIS's new "IP Coordination Ad Hoc Committee," recently launched by ATIS's Emergency Services Interconnection Forum ("ESIF") to contribute to the planning, development, and architectural design of an overall IP-based enhanced 911 system. *See* Media Advisory, "ATIS Webinar: VoIP and E911 Critical Implementation Issues" (Feb. 11, 2004) *available at* http://www.aits.org/PRESS/ pressreleases2004/021104.htm.

Any such standard also must take into account differences among types of IP-enabled services. For example, enterprise VoIP deployments, like traditional PBX, are not inherently capable of providing PSAPs with station level information (*i.e.*, the caller's phone number and precise location within the main address from which the call is placed). SBC's PS/ALI 911 service, described above, helps resolve this issue. To address the portability of VoIP end users within an enterprise, SBC and other companies have contracted with Telcordia to develop 911 interface specification standards that accommodate VoIP technologies for enterprise customers. Telecordia's interface development efforts are designed to allow IP-enabled service providers to support the proper routing of emergency calls initiated by IP enterprise customers, as well as the delivery of the associated detailed location information to PSAPs. The Commission's regulations should accommodate, not thwart, these industry-based efforts to develop 911 solutions for enterprise VoIP.

Non-registered E-911: IP-enabled services are generally portable across all broadband access points within and beyond the United States; in other words, subscribers can access their VoIP service from any location where they can access a broadband connection. While this presents enormous upside potential for IP-enabled services, it also presents significant challenges to providing E-911 service. A provider has no way of knowing, in advance, the location at which its customer will be using the service: theoretically, a customer could access his or her VoIP service anywhere there is a broadband connection. In this scenario, the provider has no way of knowing the customer's geographic location unless the customer notifies his or her provider of that geographic location.[241/]

241/ A possible short-term solution is to rely on the end user to update his geographic location each time he ports his service to a new broadband connection point.

The Commission should avoid premature regulation in this area, given the technological challenges that are yet to be addressed. As the Commission recognizes in the *NPRM*, the "development and deployment of these services [are] in [their] early stages, . . . [and] these services are fast-changing and likely to evolve in ways that we cannot anticipate."[242/] Indeed, until some technological solutions have been identified, regulation could predetermine the outcome, potentially limiting technological developments and innovation. There is sufficient market-based pressure in the industry to come up with a solution even without a government mandate to do so, as illustrated by the voluntary 911 efforts that some providers have already made to date, described above; similar strides are to be expected with respect to portable E-911.

IP-Enabled E-911 Enhancements: As noted above, IP-enabled services are not solely a source of 911 concerns; they also present 911 opportunities. The introduction of IP-enabled 911 services will expand the range of 911 services beyond voice to support multimedia options that aim to improve the utility, quality, and quantity of information passed between the caller and the PSAP operator. Already, some providers are developing next-generation capabilities that will exceed the E-911 capabilities available on the circuit-switched network.[243/] Bi-directional video communications, made possible by packet technology, could convey invaluable information from the emergency caller to the PSAP operator and vice versa. For instance, a caller could provide real-time video of the emergency situation, enabling both the PSAP operator and

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242/ *NPRM* ¶ 53.

243/ *See* VoIP Fact Report at 17 (citing H. Weaver, *McCain: Rules Must Change to Accommodate Services Like VoIP*, RCR Wireless News (Mar. 1, 2004) (quoting Vonage's chairman as stating that his company "plans to leapfrog enhanced 911 and go right to intelligent 911 that would use IP-based services to do everything from deliver a message to a homeowner's e-mail or mobile phone when 911 is dialed from the home, to gathering the potential victim's medical records and delivering them first to emergency responders and then to the hospital if necessary.")).

responsive emergency personnel to better assess and resolve the situation. Likewise, PSAP operators could augment their voice instructions with first aid video instructions appropriate for the specific medical emergency at hand. IP-enabled 911 also holds the promise of "pinpoint[ing] the specific location of the caller in a large building[,] . . . hail[ing] your doctor, and send[ing] a text or Instant Message alert to your spouse."[244/]

Another opportunity created by IP-based 911 technology is the removal of data constraints that currently limit PSAPs, most of which use low-speed modems to retrieve ALI data. PSAPs operating in an IP-enabled environment could draw on multiple databases for a variety of useful information, such as medical information for the individual in need or floor plans for the location of the emergency. Although it may be years before these dynamic emergency calling possibilities come to fruition, now is the time for the Commission to establish the kind of regulatory foundation that will enable the emergency calling system to make these future possibilities a reality. In particular, the Commission must act with caution and, where necessary, impose only minimum standards that are currently technologically feasible and necessary to ensure E-911 service for widespread IP-enabled services, without foreclosing future developments. By initially creating only baseline standards (where needed), the Commission will help IP-enabled 911 service realize its full potential and avoid stunting the technological innovations currently taking place.

D. The Commission Should Reaffirm Its Commitment to the Needs of People with Disabilities by Imposing Regulations that Ensure Their Access to IP-Enabled Services that Interconnect with the PSTN.

Access for people with disabilities to communications technology and services is an important public policy, one that Congress has explicitly required the Commission to safeguard.

244/ Powell VoIP Written Statement at 12.

Congress has recognized that such access is "essential for participation in nearly all aspects of society," "a critical tool for employment," and capable of "bring[ing] independence" to individuals with disabilities.[245/] Accordingly, it is essential that individuals with disabilities are assured access to IP-enabled services and equipment. This is especially true as such services become increasingly widespread and more central to the nation's communications. The Commission cannot effectively ensure access to communication for people with disabilities if these individuals are cut off from the next generation of communications technologies and networks that will increasingly be used to connect individuals worldwide. The Commission should assert jurisdiction over the disability access aspects of such services and equipment, and, as we show below, it has clear authority to do so. The Commission should also focus on the substance of these issues now, during the formative stages of this technological revolution when there are the most opportunities for progress, rather than after the fact. In the near term, the Commission should apply its rules implementing sections 255, 251, and 225, and Title I of the Act,[246/] as appropriate, to those IP-enabled services that interconnect with the PSTN. The Commission should also require providers of these services to contribute to the federal Telecommunications Relay Service fund.

1. IP-Enabled Services and Facilities Have Extraordinary Potential to Provide Truly Effective Access to Communications to People with Disabilities.

Just as the IP platform is revolutionizing other aspects of electronic communication, it holds the potential to do the same for access to communications by people with disabilities. Fundamentally, the IP platform makes it easier for a user to adapt the technology for his or her

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245/ *Disability Access Order* at 6420-21 ¶¶ 4-6.

246/ 47 C.F.R. §§ 6.1-7.23 (addressing obligations of service providers).

individual needs. Unlike traditional circuit-switched networks that use centrally located and inflexible software and technology, the IP-platform's open standards and more distributed and flexible digital software and technology have the potential to facilitate modification and customization to meet individual end users' needs. This customization will enable end users to tailor their individual services to use a mix of voice, text, and video to best meet their needs or the needs of the called party. With this flexibility, IP-enabled services promise to exceed the disability access capabilities of existing communications technologies, which often rely on one-size-fits all, static solutions.

IP-enabled services have already begun to transform one of the foundations of communications access — Telecommunications Relay Services ("TRS"). IP-enabled services have spawned alternative TRS options with greater functionality than those that depend on traditional TTY.[247/] IP Relay Service, for instance, enables the user to read far more text at once than using a TTY, offers more functionality (allowing the user to print and save transcribed conversations), and is far more portable.[248/] Video Relay Service ("VRS"), another IP-based TRS recognized by the Commission, uses a broadband Internet connection to provide subscribers with hearing impairments with "live" sign language interpretation for conversations.

The ability to convert information, commands, and messages to voice should become increasingly available using IP technology and equipment, and it may offer substantial benefits

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247/ TTY is a type of device that uses tones to transmit typed conversations over phone wires at the rate of 45 baud per second. A specially trained operator known as a Communications Assistant ("CA") acts as an intermediary between the TTY caller and others on the PSTN, facilitating communication by relaying typed messages by voice and converting voice to typed messages.

248/ Suzanne Robitaille, *New Telecom Connections for the Deaf*, Business Week Online (Oct. 9, 2002).

to individuals with vision-, speech- and mobility-impairments.[249/] Indeed, IP-enabled services already are using such capabilities to usher in public safety advances for individuals with disabilities. One industry participant already has created an emergency-broadcast system that simultaneously sends both audio streams and text messages to multiple IP phones, notifying employees with hearing or vision limitations of emergency alerts in accessible formats.[250/]

2. The Commission Has Authority to Ensure Access to IP-Enabled Services and Facilities for People with Disabilities.

The Commission should play a central role in ensuring that the IP-enabled services market delivers on the substantial promise it already has shown in promoting disability access. To do so, the Commission should affirm its authority to ensure access for people with disabilities to IP-enabled services. The Commission has such authority under the non-carrier-specific provisions of sections 255 and 225 in Title II, and its ancillary jurisdiction under Title I. The Commission's direct authority in this area is grounded in sections 255, 251, and 225 of the Act, which require manufacturers of telecommunications equipment and CPE and providers of telecommunications services to make their products and services accessible to people with disabilities,[251/] prohibit telecommunications carriers from installing network features, functions, or capabilities that preclude disability access,[252/] and obligate the Commission to ensure that interstate and intrastate TRS is available to hearing- and speech-impaired individuals.[253/]

249/ Business Week Online, *How VoIP Can Connect the Disabled* (Apr. 28, 2004).

250/ *Id.*

251/ 47 U.S.C. § 255.

252/ *Id.* § 251(a)(2).

253/ *Id.* § 225.

As a preliminary matter, these statutory provisions give the Commission express authority to ensure that the *equipment* used for IP-enabled services is accessible to individuals with disabilities. Section 255 applies on its face to manufacturers of telecommunications equipment and CPE.[254/] The Commission has defined CPE for this purpose to include equipment used for telecommunications, not just telecommunications services.[255/] The Commission's current rules, implemented under its express authority under section 255, require manufacturers of the facilities and CPE used for the transmission capability of IP-enabled services (an IP-enabled telephone handset, for example) to "ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities."[256/]

The Commission may also exercise ancillary jurisdiction under Title I to require information service providers, including IP-enabled service providers, to ensure the accessibility of their services to individuals with disabilities. While the text of sections 255 and 251 apply specifically to "providers of telecommunications services" and "telecommunications carriers," respectively, the Commission is obligated under section 151 of the Act to ensure nationwide, generally available communications "to all the people of the United States." This obligation empowers the Commission to ensure that IP-enabled communications are available to subscribers with special needs. As noted above, "Congress sought 'to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.'"[257/] The Commission could not "discharge its

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254/ *Id.* § 255(b).

255/ *Disability Access Order* at 6451-53 ¶¶ 81-88.

256/ 47 U.S.C. § 255(b); 47 C.F.R. §§ 6.1-7.23.

257/ *Computer & Communications Indus. Ass'n*, 693 F.2d at 213.

overall responsibilities"[258] to ensure disability access to communications if individuals with disabilities could be cut off from the next generation of communications technologies and networks that will increasingly be used to connect individuals nationwide.

Just as important, the Commission's broad responsibilities in this area necessarily include the ancillary authority to ensure that individuals with disabilities who remain on the PSTN can communicate with subscribers of IP-enabled services. The value of accessibility to legacy telecommunications would be significantly eroded if an individual with access today could no longer use his or her legacy service to communicate with the growing subscriber base served by IP-enabled services. Indeed, the Commission already has determined that it has ancillary authority to extend section 255's disability access requirements to information services — and, in fact, did so with respect to voicemail and interactive menu services[259] — where doing so is "essential to the ability of persons to effectively use telecommunications."[260]

3. The Commission Should Impose its Current Disability Access Rules on IP-Enabled Services That Interconnect with the PSTN.

The Commission should exercise its ancillary jurisdiction and extend its current rules implementing section 255 to those IP-enabled services that interconnect with the PSTN.[261] The Commission's ancillary jurisdiction is at its apex with respect to such services because they are part of the interconnected communications network over which the Commission has clear authority under Title I of the Act. Further, because these services may replace legacy voice services, Congress's concern over the accessibility of telecommunications services would

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258/ *Southwestern Cable*, 392 U.S. at 177

259/ *Disability Access Order* at 6455 ¶ 93.

260/ *Id.*; *see Midwest Video II*, 440 U.S. at 706-07 (ancillary jurisdiction appropriate to "prevent interference with the Commission's work").

261/ 47 C.F.R. §§ 6.1-7.23.

reasonably apply to these services. As noted above, the courts have recognized that Congress intended for the Commission to be able to carry out the goals and principles of the Act even in the face of new technologies and services.[262/]

In extending its section 255 rules to the provision of voicemail and interactive services, the Commission determined that "failure to ensure accessibility of voicemail and interactive menu services, and the related equipment that performs these functions, would seriously undermine the accessibility and usability of telecommunications services required by section 255 . . . ."[263/] It determined that extending section 255 obligations to voicemail and interactive menus would "avoid the disruptive effects caused by inaccessible voicemail and interactive menus so as to ensure that the implementation of section 255 is not thwarted."[264/]

The same analysis applies to IP-enabled services that interact with the PSTN. Because calls move seamlessly between the PSTN and IP networks, both networks must afford adequate accessibility in order for the explicit accessibility obligations upon telecommunications services to be effective. Limiting any accessibility requirements to IP-enabled services that interconnect with the PSTN is a reasonable approach at this time. Such services are designed to allow IP service users to interact transparently with legacy PSTN end users. People with disabilities who remain on the PSTN should not suffer a degradation in their ability to communicate generally with other end users simply because other users have migrated to new technology and subscribe to services that lack the required functionality. But as the market develops, the Commission should revisit this issue to determine if it can and should take further actions to meet Congress's

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262/ *See, e.g., Southwestern Cable*, 392 U.S. at 177.

263/ *Disability Access Order* at 6459-60 ¶ 103.

264/ *Id.*

accessibility goals. In making this analysis, the Commission should focus on Congress's stated goal of communications services for all. While technology used to deliver communications may change, the needs of consumers with disabilities for access to such communications do not. The Commission also should consider the risks of excluding any services from rules regarding access. Such exclusions run the risk of undermining current levels of access, to the extent traffic migrates to services that have no PSTN connection. In fact, the perceived burden of accessibility requirements on some services and not others could even encourage that migration. Such an outcome would threaten the ability of callers to reach people with disabilities and vice versa.

4. The Commission Should Extend TRS Contribution Requirements to IP-Enabled Service Providers that Interconnect with the PSTN, and Should Affirm Its Prior Decision to Classify Certain IP-Enabled Services as Reimbursable TRS.

As IP-enabled services that interconnect with the PSTN will continue to proliferate and increasingly will be used by TRS users, the Commission should extend TRS contribution requirements to providers of these services. While section 225 provides only that TRS costs must be recovered from "subscribers for every interstate service,"[265/] without specifying "telecommunications service," the Commission currently requires TRS contributions only from carriers providing interstate telecommunications services.[266/] The Commission at minimum, however, has ancillary authority to impose contribution requirements on IP-enabled service providers that interconnect with the PSTN. Requiring providers of these services to contribute will ensure continued support for TRS as traffic migrates from traditional telephony to IP-enabled services.

265/ 47 U.S.C. § 225(d)(3)(B).

266/ *See* 47 C.F.R. § 64.604(c)(5)(iii)(A).

The Commission should also continue its current course of monitoring developments in the delivery of TRS and provide funding for IP-based TRS that improve relay services. The Commission has already found that IP Relay and VRS, two IP-based services, qualify as TRS and therefore are eligible for reimbursement from the Interstate TRS Fund.[267/] That decision will serve to encourage additional innovation that will benefit individuals with disabilities, and such continued innovation is essential to ensuring that the full potential of IP innovations for improved access is realized.

E. The Commission Should Affirm that It Has Authority to Require Universal Service Contributions from IP-Enabled Service Providers and, When and If Appropriate, to Provide Universal Service Support to Such Providers.

As the Commission recognizes,[268/] the emergence of IP-enabled services as an alternative and complement to conventional circuit-switched telephony presents the Commission with both opportunities and challenges with respect to the existing universal service regime. First, on the contribution side, as traffic migrates from telecommunications services to IP-enabled services, the present telecommunications service revenue base for state and federal universal service contributions could diminish, increasing the burden on existing contributors. As discussed below, the Commission should affirm that it has the legal authority to widen the contribution base to require contributions from any provider of IP-enabled services, and it should exercise that authority at the present time to extend that obligation at least to providers of IP-enabled services that connect to the PSTN. Second, on the disbursement side, the Commission should affirm its authority to provide universal service support for certain IP-enabled information

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267/ Declaratory Ruling and Second Further Notice of Proposed Rulemaking, *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 17 FCC Rcd 7779, 7792 ¶ 41 (2002).

268/ *NPRM* ¶¶ 63-67.

services at some point in the future if warranted, although the exercise of that authority is not appropriate today. The Commission's authority over universal service under sections 254 and Title I of the Act give it ample authority to accomplish both objectives.

1. The Commission Has the Authority to Assess Universal Service Contributions on All IP-Enabled Service Providers.

Section 254(d) of the 1996 Act grants the Commission both mandatory and permissive authority to assess universal service contributions on a broad range of communications service providers whose services contain some form of telecommunications component.[269] In addition, under Title I of the Act, the Commission has sufficient ancillary authority to assess universal service contributions on those communications services that lack a telecommunications component. Together, these provisions endow the Commission with more than enough authority to require providers of IP-enabled services to contribute to universal service if it deems such contributions necessary and appropriate.

While the Commission's mandatory authority under section 254(d) extends to "every telecommunications carrier that provides interstate telecommunications services,"[270] the Commission's permissive authority authorizes it to assess contributions from "any other provider of interstate *telecommunications* . . . if the public interest so requires."[271] This permissive authority extends to any IP-enabled service provider that offers IP-enabled service to its

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269 As discussed below, that telecommunications component need not be solely in the "last mile" connection to the end user.

270 47 U.S.C. § 254(d).

271 *Id.* (emphasis added). The Act defines telecommunications as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. 47 U.S.C. § 153(43). As the Commission recently held in its *Pulver Declaratory Ruling*, "[u]nder the statute, the heart of 'telecommunications' is transmission." *Pulver Declaratory Ruling* at 3312 ¶ 9.

subscribers with some form of telecommunications, *i.e.*, transmission. As the Commission already has tentatively concluded, an information service provider that "owns or leases the underlying transmission facilities on which its packets are transmitted — *e.g.*, switches or routers — is providing telecommunications"[272] and thus falls within the scope of the Commission's discretionary contribution authority under section 254(d). Indeed, the Commission reached essentially the same result in its *Report to Congress*, concluding that where an information services provider owns or leases transmission facilities in order to provide an information service, it would be "providing telecommunications as a non-common carrier" and "may be required to contribute to the preservation and advancement of universal service if the public interest so requires."[273]

The Commission also has the authority to require universal service contributions from IP-enabled service providers whose services do not contain a discrete telecommunications component — albeit pursuant to its ancillary Title I authority, not its direct section 254 authority. Indeed, the Commission had authority to design and administer a universal service program long before Congress adopted section 254 in the 1996 Act. Title I, as the Commission and the courts have long recognized, authorizes the Commission to "regulat[e] interstate . . . commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication

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[272] Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3033 ¶ 25, 3053 ¶ 76 (2002) ("*Broadband NPRM*") (tentatively concluding that "in the case where an entity combines transmission over its own facilities with its offering of wireline Internet access service, the classification of that input is telecommunications").

[273] *See Report to Congress* at 11534-35 ¶ 69, 11569-70 ¶ 139; *see also id.* at 11557 ¶ 117 (finding that "other providers of interstate telecommunications" who own or lease facilities to provide telecommunications could be assessed universal service contributions under the Commission's permissive authority) (citation omitted).

service with adequate facilities at reasonable charges,"[274] and thereby establishes a mandate for the Commission to create a universal service program. The D.C. Circuit expressly "recognize[d] the prominence of [section 151's] universal service objective" among the several statutory objectives of Title I.[275] The Commission relied on this authority for over a decade before passage of the 1996 Act to establish universal service funding for basic telephone service in high cost areas, supported by contributions from all long-distance service providers.[276]

In creating section 254, Congress acted to formalize and expand the Commission's Title I universal service authority, not limit it. The statute obligates the Commission to both preserve and advance universal service; it thus acknowledges that such support was already in place prior to enactment of section 254, while providing the Commission with a mandate to take action to further the goals of universal service.[277]

Significantly, the Title I sources for this authority, sections 151 and 154(i), are not limited to "telecommunications service providers" or even other providers of

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[274] 47 U.S.C. § 151.

[275] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1108 (D.C. Cir. 1984); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (declaring that "universal service is an important FCC objective" and upholding establishment of Universal Service Fund under section 151); *see also GTE Serv. Corp.*, 474 F.2d at 730-31 (finding that the FCC has authority under 47 U.S.C. §§ 151 and 154(i) to regulate the data processing activities of carriers if those activities pose a "threat to efficient public communications services at reasonable prices").

[276] *See generally* Decision and Order, *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 96 F.C.C.2d 781, 791-802 ¶¶ 21-48 (1984), *aff'd*, *Rural Tel. Coalition*, 838 F.2d at 1315.

[277] 47 U.S.C. § 254(b)(5). As noted, nothing in section 254 suggests that it is designed to limit the Commission's pre-existing Title I authority; therefore, that narrow reading should be disfavored. As the courts have held, "repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497 (1936)). The Supreme Court also has made clear that overlapping statutes must be read "to give effect to each if [the court] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

"telecommunications." Instead, the Commission retains broad jurisdiction over any information service provider involved in "interstate and foreign commerce in communication by wire and radio."[278/] If the Commission determines that the migration of traffic from the PSTN to new information services is materially affecting the ability to sustain universal service as a whole as well as affecting the costs imposed on existing universal service contributors, it would be well within its ancillary authority to impose contribution obligations on the providers of such information services, in order to prevent "interference" with its ability to accomplish its universal service goals.[279/]

2. The Commission Should Exercise Its Authority to Require Universal Service Contributions from IP-Enabled Service Providers As Needed to Preserve the Federal Contribution Base.

Having concluded that the Commission has both permissive contribution authority under section 254(d) and ancillary contribution authority under sections 151 and 154(i) to require IP-enabled service providers to contribute to the universal service fund, the next question is whether the public interest requires the exercise of this authority to preserve the federal universal service contribution base. The short answer is that such a decision would clearly serve the public interest, at least with respect to any IP-enabled service that includes the capability to send traffic to or receive traffic from the PSTN.

The Commission announced four principles for exercising its permissive authority in its *Report to Congress*: (1) to establish "a broad contribution base so that the burden on each contributor will be lessened;" (2) to require contributions from carriers that "utilize the PSTN, which is supported by universal service mechanisms;" (3) to minimize, to the extent possible, the

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278/ 47 U.S.C. § 151.

279/ *See Midwest Video II*, 440 U.S. at 706-07.

"competitive disadvantage" suffered by carriers with universal service obligations relative to carriers without such obligations; and (4) to reduce carriers' incentives to structure their service offerings to circumvent contribution obligations.[280/] All four of these considerations weigh in favor of assessing contributions on IP-enabled service providers — whether their services include a discrete telecommunications component or not — that connect with the PSTN. First, this policy will ensure the long-term financial health of the universal service fund, even as IP-enabled services become more established. Second, it will ensure that all providers who benefit from the PSTN's ubiquity will also bear responsibility for supporting that ubiquity. Third, it will prevent IP-enabled service providers from unfairly undercutting the prices of existing telecommunications service providers solely because the latter are subject to the Commission's mandatory authority and must thus incur a costly contribution burden. Fourth, it will remove any incentive for IP-enabled service providers to attempt to structure their services to avoid universal service contribution obligations.

As noted above with respect to access charges, the Commission already has recognized that those who use and benefit from the PSTN should contribute to its support.[281/] The Commission previously relied on this same rationale in extending USF contribution requirements to private carriers, finding that, "[w]ithout the benefit of access to the PSTN, which is supported by universal service mechanisms, these providers would be unable to sell their services to others for a fee . . . . [T]hese providers, like telecommunications or common carriers, have built their businesses or a part of their businesses on access to the PSTN."[282/] IP-enabled service providers

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280/ *Report to Congress* at 11565-66 ¶¶ 132-35.

281/ *AT&T Access Charge Order* ¶ 15.

282/ *See* Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9184 ¶ 796 (1997).

that connect with the PSTN to send or receive calls likewise benefit from that legacy network (and impose costs on it); as a result, they should bear some of the burden of supporting that network.

Thus, the Commission has authority to assess contributions from VoIP providers, such as Vonage, that market their products as effective substitutes for (and improvements over) conventional circuit-switched telephony only because they can offer their subscribers full access to the PSTN.[283/] It would be competitively perverse to give such providers an artificial regulatory advantage by exempting them from the direct universal service obligations to which their circuit-switched rivals are subject.

Similar competitive concerns may require the Commission to include certain other IP-enabled service providers within the scope of the universal service contribution requirement, even in the absence of connection to the PSTN. Specifically, the Commission should use this opportunity to clarify that any universal service contribution requirement should apply equally to providers of wireline broadband Internet access and providers of cable modem service. Although these services both are IP-enabled services, the Commission found the former to be a telecommunications service, and it is thus covered by the Commission's mandatory authority; because it found the latter to be an information service with a telecommunications component, it is covered by the Commission's permissive authority (subject to the final outcome of *Brand X*). But the Commission has the *authority* to require contributions of both. And as SBC has argued

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283/ Vonage's interconnection with the PSTN contrasts with Pulver's FWD service, which lacks a similar connection with the PSTN. Pulver's service does not allow subscribers to talk to POTS users, and is offered entirely over the Internet. *See Pulver Declaratory Ruling* at 3309 ¶ 5.

elsewhere,[284] principles of competitive neutrality require that, unless and until the Commission revisits its determination that wireline broadband is a telecommunications service subject to the mandatory contribution obligation, the Commission must exercise its *permissive* authority to impose contribution requirements on cable modem service. This service competes directly with wireline broadband Internet access, which currently is subject to a sizeable mandatory contribution obligation. This disparity severely slants the competitive playing field for broadband services in favor of cable modem service and creates disincentives to investment for wireline broadband Internet access providers despite Congress's mandate that the FCC provide for a pro-competitive, deregulatory framework to encourage deployment of advanced telecommunications and information technologies.[285]

As the Commission observes, its decision to impose contribution requirements on IP-enabled service providers will have implications for the application of any contribution methodology it chooses in the universal service contribution proceeding.[286] But, as the

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[284] *See* Comments of SBC Communications Inc., *Broadband NPRM*, at 43-44 (filed May 3, 2002).

[285] As SBC explained in its comments in the Commission's recent section 706 proceeding, for example, SBC expects its advanced services affiliate, Advanced Services Inc. ("ASI"), to contribute more than $100 million in universal service contributions on DSL service in 2004. These costs, which are not borne by dominant cable modem service providers, often must be passed on to end user customers, creating a substantial and unfair competitive disadvantage for DSL providers. *See* Comments of SBC Communications Inc., Notice of Inquiry, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* GN Docket No. 04-54, at 13-15 (filed May 10, 2004).

[286] *See, e.g., NPRM* ¶ 64 (noting that, under "a telephone number-based methodology, VoIP providers that utilize telephone numbers would be subject to assessment" while under a "connections-based methodology, providers of broadband connections used to provide VoIP could be subject to assessment").

Commission appears to recognize,[287] that methodological choice is logically separate from the question of which carriers should bear a contribution obligation, and the Commission must make that latter determination first. This determination should inform the methodology debate rather than await its resolution. If, for example, the Commission decides that IP-enabled service providers that offer service without a telecommunications component should help to support universal service, the contribution methodology should then be tailored to ensure that such providers are in fact assessed.

Finally, the Commission should also consider the impact of its contribution decisions on state universal service programs. As traffic migrates from intrastate services to inherently interstate IP-enabled services, state revenues are likely to decline and federal revenues to increase. To the extent contributions remain revenue-based, this migration, in turn, may put pressure on state authorities to increase per-carrier contribution requirements to make up any shortfall. To head off such potentially destabilizing developments, the Commission should work with states to develop a coordinated response for state and federal contribution mechanisms to address the migration of communications services from the PSTN to IP networks.

3. The Commission Should Acknowledge that, While Universal Service Support for IP-Enabled Services Is Not Appropriate Today, the Commission Has Statutory Authority to Support Such Services in the Future, If and When Appropriate.

As IP-enabled services become sufficiently widespread and begin to replace PSTN-based services, the Commission may someday in the future conclude that public policy favors extending universal service support to such services.[288] While that time has not yet arrived and

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287 *Id.*

288 It is already settled, however, that the Commission has authority to support information services through the existing section 254 rural health and schools and libraries mechanisms. *See*

may not arrive for many years, if at all, the Commission should use this proceeding as an opportunity to affirm the statutory basis for its authority to extend such support if appropriate.

As the Commission observes, section 254(c) of the Act defines universal service as "an evolving level of telecommunications services,"[289/] and, as discussed above, IP-enabled services are interstate information services, not telecommunications services. No matter what the contours of that specific Title II mandate, however, the Commission retains its more general Title I authority, described above, "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, . . . wire and radio communication service with adequate facilities at reasonable charges . . . ."[290/] Nothing in the text or legislative history of section 254 suggests that Congress intended to limit that authority in any way. Indeed, Congress clearly contemplated, in enacting section 254, that the definition of universal service would evolve to reflect technological innovation, including the growth of information services.[291/] Thus, even if section 254 does not explicitly *authorize* support for information services, it would be a vast overreading of that provision to read it as *prohibiting* the Commission from providing such support to advance the general mandate of section 151, which, as discussed above, supplied

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47 U.S.C. § 254(h)(2)(A); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 443-44 (5th Cir. 1999) (upholding the Commission's authority to extend universal service support under schools, libraries and rural health care programs to information services provided by non-telecommunications carriers).

289/ *NPRM* ¶ 65 (citing 47 U.S.C. § 254(c)(1)); *see also* Recommended Decision, *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 14095, 14102-03 ¶ 19 (2002).

290/ 47 U.S.C. § 151.

291/ *See id.* § 254(c) (defining universal service to "take[] into account advances in telecommunications and information technologies and services"); *id.* § 254(b)(2) (universal service must be based on the principle that "[a]ccess to advanced telecommunications and information services should be provided in all regions of the nation"); S. Rep. No. 103-367, at 33 (1994) (stating an intent "[t]o ensure that the definition of universal service expands over time . . . [and] include[s], at a minimum, the telecommunications and information services that are subscribed to by a substantial majority, not simply a majority, of residential customers").

the Commission with sufficient authority to maintain a universal service program for more than a decade before Congress enacted section 254 in the 1996 Act.[292/] Accordingly, although there is no indication that support for IP-enabled services would be appropriate at the present time or in the near future, the Commission's longstanding Title I authority to make affordable communications available nationwide fully empowers it to assert authority to support new technologies at a later date should that become necessary.

F. Industry-Specific Consumer Protection Regulation Is Not Only Undesirable Because It Could Stunt Emerging IP-Enabled Services, But Also Generally Unnecessary Due to Robust Competition for These Services.

In addressing the issue of consumer protection, the Commission must balance the need to ensure that consumer interests are adequately and effectively protected against the goal of avoiding overregulation that could stunt these emerging services. This balance is appropriately struck for these services by relying on generally applicable consumer protections laws, which will apply if the Commission finds these services to be information services. In addition, because of the strong competition in this market, providers have every incentive to be responsive to consumer demands. Thus, while the Commission could employ its Title I ancillary jurisdiction to extend certain communications-specific consumer protection regulations to IP-enabled services,[293/] it need not and should not do so because consumers are protected by

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292/ As an additional "belt and suspenders" measure to ensure that it has sufficient authority to support IP-enabled services, the Commission could also exercise its authority under section 10(a) to forbear from the provisions in sections 254(c)(1) and 254(e) that limit universal service support to telecommunications services.

293/ *See, e.g.*, Order on Reconsideration, *Promotion of Competitive Networks in Local Telecommunications Markets*, 32 Communications Reg. (P&F) 118 ¶¶ 7-8 (2004); Order, *2000 Biennial Review — Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 00-257 ¶ 9 (rel. May 4, 2004).

generally applicable consumer protection laws, which are effective in all other non-common carrier markets.

Generally applicable consumer protection laws apply to providers of IP-enabled services and protect consumers of such services from unfair or deceptive practices.[294/] Such laws are designed to prevent deceptive and unfair business, advertising, and billing practices by any business, and to ensure that businesses comply with their privacy commitments and with credit reporting guidelines. Thus, even if the market does not independently constrain such conduct, the existing, generally applicable consumer protection regime provides sufficient security and recourse.

The market for IP-enabled services is characterized by low barriers to entry, and service is already provided today by a variety of entities, including equipment manufacturers, software companies, and other "noncarriers" that specialize in the provision of IP communications. As a result, no provider exercises market power that allows it to impose unfair conditions on consumers against their will. To the contrary, consumers can easily "vote with their feet" if a provider fails to meet their expectations, and choose a provider that offers better and more responsive service.[295/] A provider that engages in unfair or deceptive practices (such as "cramming") is likely to swiftly lose customers to its competitors or be charged with fraudulent

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294/ *See, e.g.*, California Business and Professions Code § 17500 *et. seq.* (establishing civil liability for "untrue or misleading" advertising or marketing activities); s*ee also Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (holding that these consumer protections are not preempted by federal law).

295/ Of course, consumers' ability to switch providers depends in part on their ability to port their numbers, as discussed above. This further underscores the need to extend that requirement to providers of IP-enabled services.

business practices.[296] As FCC Commissioner Abernathy has explained in the context of Internet services, "the robustly competitive market for ISP services gives providers ample incentive to engage in consumer-friendly practices and punishes providers that fail to do so. . . . [M]ajor ISPs have developed detailed policies for protecting customer privacy, irrespective of government mandates."[297]

For these reasons, the Commission generally should not impose consumer protection rules designed for legacy services, which were not under the jurisdiction of the generally applicable consumer protections laws, on IP-enabled services. For example, special rules to protect customer proprietary network information ("CPNI"), which apply to telecommunications carriers under section 222 of the Act,[298] should not be applied to IP-enabled service providers. Such rules have never been deemed necessary for Internet services or application providers, and it is not clear that there is reason for heightened concern with respect to IP-enabled service providers like VoIP providers. While the Commission has *retained* CPNI rules for telecommunications services it deemed competitive, such as wireless and long distance, here the Commission would be reaching out to *impose* these protections on an industry that already has functioned well without them. And the Commission has recognized, even when deciding to retain CPNI protections, that forbearing from CPNI restrictions can result in benefits to consumers and carriers, such as "promot[ing] a free flow of information from the carrier to the

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296/ *See, e.g., Bill Buck Chevrolet, Inc. v. GTE Florida, Inc.*, 54 F. Supp. 2d 1127 (M.D. Fla. 1999) (customers claimed fraud and RICO violations for alleged fraudulent billing practices and "cramming").

297/ Separate Statement of Commissioner Kathleen Q. Abernathy, *Broadband NPRM* at 3070.

298/ *See NPRM* ¶ 71.

consumer [and] potentially decreasing the carriers' costs of marketing."[299/] These considerations are especially important in the market for IP-enabled services where Congress and the Commission have emphasized the need for an unregulatory approach to encourage broader deployment of these developing technologies.

In addition, here the Commission can determine that market forces already have successfully promoted responsible protection of consumer privacy. In response to consumer demand, Internet services and application providers, including SBC, have voluntarily joined industry-wide groups such as the TRUSTe Privacy Partnership to develop standards for protection of consumer privacy and methods to ensure compliance with them. SBC and other like-minded providers, in order to attract customers by promising reliable privacy protections, have their privacy practices reviewed for compliance by TRUSTe. And the Federal Trade Commission ensures that companies stand by their privacy policies and promises.

The "Truth-in-Billing" ("TIB") rules the Commission has adopted pursuant to sections 201 and 258 of the Act likewise are unnecessary. The FCC adopted its TIB rules because common carrier billing practices were specifically excluded from the generally applicable consumer protection statutes.[300/] This would not be a concern if IP-enabled services are correctly classified as information services; since those services would not be telecommunications services, they would be covered by the generally applicable rules. Similarly, the section 258

299/ Order on Reconsideration and Petitions for Forbearance, *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, 14 FCC Rcd 14409, 14441-42 ¶ 63 (1999).

300/ *See* First Report and Order and Further Notice of Proposed Rulemaking, *Truth-in-Billing and Billing Format*, 14 FCC Rcd 7492, 7508 ¶ 27 (1999) (citing 15 U.S.C. § 45(a)(2)).

slamming protections need not be imposed on IP-enabled services.[301/] To the extent it exists in a VoIP environment, slamming likely could be addressed as a fraudulent business practice under general consumer protection statutes.[302/]

There is one limited exception to this general policy of not imposing communications-specific consumer protection regulations on IP-enabled services. While the Commission should not (and could not) impose section 214 entry and exit rules on IP-enabled service providers because such providers are not "carriers,"[303/] it might be appropriate for the Commission to require IP-enabled service providers to give some limited form of advance notice of discontinuance of service to their customers.

The market functions least well, if at all, in protecting individual consumers where a business is exiting, because it has no incentives to respond to customer demands. Some regulatory oversight of market exit activity may therefore be appropriate, especially if consumers come to depend on IP-enabled services for their basic communications needs. Such oversight could also be critical to the extent IP-enabled services are used for national defense or public safety purposes. The Commission's mandate to ensure "adequate facilities" for communications, especially "for the purpose of the national defense" and for "promoting safety of life and property," provides a clear basis for exercising Title I ancillary authority to impose some form of limited notice requirement before an IP-enabled service provider is permitted to discontinue

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301/ *See NPRM* ¶ 72.

302/ *See, e.g., Valdes v. Qwest Communications Intern., Inc.*, 147 F. Supp. 2d 116, 122 (D. Conn. 2001) (holding that a class of telephone customers whose service had been switched without their consent could bring a claim under the Connecticut Unfair Trade Practices Act and the common law of fraud).

303/ *See NPRM* ¶ 72.

service.[304/] These same concerns about accountability and security also may counsel in favor of a limited registration requirement for providers of IP-enabled services, whereby providers would supply basic corporate contact information to the FCC (*e.g.*, name, address, phone, e-mail, and contact person). Such a registration requirement, however, should not be a prerequisite to the initiation of service and must not serve in any way as a barrier to market entry.

SBC remains committed to working with consumer groups and other stakeholders to ensure proper protections for consumer interests including consumer privacy and the prevention of unfair business practices. Given SBC's commitment to these principles, and the competitive environment in which all providers operate in this emerging industry, the Commission should avoid rushing to judgment and increasing the burden of doing business in this emerging industry when no real threat to consumer interests has yet been identified and existing regulation provides adequate safeguards for consumer interests.

304/ *See* 47 U.S.C. § 151.

CONCLUSION

By taking the various steps discussed above, the Commission will achieve its stated goal of ensuring the continued unregulation of IP-enabled services, and in the process eliminate regulatory uncertainty and promote the growth and evolution of IP-enabled services generally.

Respectfully submitted,

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